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THE ARIZONA CITIZEN

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SUPREME COURT OF ARIZONA.

JANUARY TERM, 1876.

Pedro Charaulcau, Plaintiff and Appellant, vs Richard Wolfenden, Defendant and Respondent.

On Appeal from the First District Court, Pima County, Arizona.

Titus & Hughes for appellant, Farley & Pomroy, for respondent.

Opinion of the court by Associate Justice C. A. Tweed.

The action was ejectment for three quarter sections of land, lying in Pinal county and contiguous to each other, described in the complaint by their legal subdivisions and as being generally known as the Robledo, Moreno and Duran ranches.

In his complaint, the plaintiff alleges that he was seized in fee of the premises on the eleventh day of February, 1874, and that while so seized to-wit, on the fifth day of July, 1875, he was ousted by the defendant.

The answer denies that the plaintiff was ever seized of the premises, or was ever entitled to the possession of the same or any part thereof; denies that the defendant entered into the possession of the premises while the plaintiff was so seized, as alleged in the complaint, and denies that he unlawfully withholds, or at any other time has unlawfully withheld, the possession of the premises from the plaintiff; alleges seizure in himself of one quarter section of the lands, on the first of October, 1873, by virtue of a deed of bargain and sale for the consideration of $500, from Abram Moreno and his wife Mariano Moreno, to Anna C. Woffenden, the wife of the defendant, bearing the date above mentioned, and alleges seizure of the other two quarter sections, on the tenth of December, 1873, by deed of bargain and sale of that date, for the consideration of $2,100, from Ygnacio Robledo and Romula Robledo, his wife, to the said wife of the defendant; alleges that the said Anna C. Woffenden was on the first of October, 1873, and on the tenth day of December 1873, and still was, at the date of the answer, the wife of the defendant.

On the trial, the plaintiff offered in evidence a deed for the premises from Anna C. Woffenden, to the plaintiff, made February 11, 1875, for the consideration of $5000.

Defendant's counsel objected to the admission of the deed on the grounds: First, that the acknowledgment was defective, having been taken before a Justice of the Peace, not a proper officer; Second, that it did not contain the declaration required by the statute, as to the person signing the same having been examined separate and apart from and without the hearing of her husband, &c., &c., Third, that it had not been shown that Anna C. Woffenden had power to convey the premises; that it had been admitted in open court, by plaintiff's counsel, that from August, 1872, the said Anna C. Woffenden had been and then was the wife of the defendant, and that no showing had been made or offered that the premises were her separate property. Those objections were collectively sustained by the court, and the plaintiff excepted to the ruling.

Assuming for the present that the premises in the controversy were the separate property of the grantor, and passing for the present also the question whether any acknowledgment on the part of the grantor of the deed was necessary to entitle it to be received in evidence in the case between these parties, was the acknowledgment defective in having been taken before a Justice of the Peace, or in that it was not made upon an examination separate and apart from and without the hearing of her husband?

In Miller vs Fisher, decided at the last term of this court on a hearing had before a full bench, it was held without dissent on the part of either member of the court, that under the Act of 1871, it was not necessary that a contract by a married woman of the age of 21 years and upwards, as to her separate property, should be evidenced by a writing signed by her and acknowledged by her, upon an examination separate and apart from her husband, &c., &c.

We are now asked to reconsider this ruling, and adopt the theory that the Act of 1871 operated, to change the law in this regard to this extent only,—that the wife may convey without being joined with the husband in the conveyance, but must still acknowledge the execution of the instrument, separate and apart, &c., &c., as required by the Act of 1865. One year has passed since the decision in Miller vs Fisher was made and published, and important rights have doubtless grown up and vested under the construction which we then gave to the statutes in question. In such a case the reasons for overruling a former decision should be very clear and conclusive. Besides this, unless it very clearly appears that the former ruling was erroneous, the court may properly consider whether the construction given to the statute, by its former decision on the ruling it is now urged to make, is most beneficial to the parties whose rights are to be controlled thereby.

Conceding then, for the present, that there may be reasonable doubts as to the correctness of the former ruling, does the construction thus given to the statute deprive the wife of any substantial right, or in any manner make such rights less secure; does it deprive her of any safeguard in the control or disposition of her separate property, or make less simple and safe the rules for its disposal? In other words, is or was the provision in our statutes requiring this acknowledgment of a contract or conveyance by the wife, on an examination separate and apart from her husband, &c., of any practical use whatever? Of course there can be no doubt that under the Act of 1871, the wife may convey her separate property by her deed, without being joined by her husband. This she may do without any consultation with or consent from him. To what end then, having executed a deed for her separate property, should she be required to go before a notary, or other officer, and make this acknowledgment upon an examination separate and apart from her husband, &c? If she desires to convey her property, she may do so without his knowledge. If the husband has coerced or over-persuaded her into the execution of the conveyance, and she has been submissive to his will, as she likely to assert her own wishes and refuse to make the acknowledgment, when in the presence of a notary? If this safeguard, so called, for the wife's interest was ever, under any law for the conveyance of her separate property, of any practical value, which we very much doubt, there can be no doubt that under a law allowing the wife to convey without being joined with her husband, and without his consent or even knowledge, such a provision is a vain thing, a needless, useless requirement, productive of no possible beneficent results.

But the statute in the Howell Code, "Of Conveyances," Compiled Laws, pages 362 and 363, section 22, which it is insisted should be taken in connection with the Act of 1865, provides, "that upon this examination, separate and apart from the husband," &c., "the wife shall be made acquainted with the contents of the conveyance," &c., and it was gravely and earnestly urged, by counsel for respondent, that this was an important safeguard to the wife, the presumption of law being that the wife would not know the character of the instrument, until so informed by the officer taking the acknowledgment; and it is not without some regret that we admit that there were American authorities cited, sustaining the counsel in his position. What is the basis for such a presumption? It must be found, if anywhere, in the supposed ignorance or stupidity of the wife. Before her marriage, if of the age of 21 years, and after her husbands death, the law presumes her competent to buy, sell and convey property, and supposes she acts in such matters as intelligently as if she were of the opposite sex; but during the existence of the marriage relation, somehow this condition of ignorance and stupidity is supposed to settle down upon her, to benumb her faculties, to cast a cloud upon her intelligence, to be lifted only by the death of her spouse, or other severance of the marriage bonds. We are quite sure that the presumption contended for by the counsel for the respondent, that a woman of mature years and an American wife, ceases, from the day of her marriage, to know what she is doing in the execution of a conveyance until advised of the contents of the instrument, by a notary or other officer, obtains no where else than in a court of justice, and should no longer obtain there; and we are equally certain that the Legislature of Arizona, in enacting the law of 1871, which gives to the wife the sole and exclusive control of her separate property, enabling her to convey the same without being joined with her husband, "as fully and perfectly as if unmarried," did not intend that any such presumption of the wife's ignorance or stupidity should obtain thereafter. Again, as to the utility of the provision for this acknowledgment of the wife, upon an examination separate and apart, &c., it is somewhat remarkable, considering the learning and research which has been bestowed upon the matter, that not a case has been reported, so far as we can discover, wherein it appears that this safeguard, so called, even in a single instance, operated to protect the interest of the wife, or save her from coercion or imposition. We do not remember the citation of such a case, nor have we in our own experience, nor in our association with the legal profession, known or heard of any case where this provision ever operated as a safeguard to the wife in any respect whatever. Again, while we deem the provison referred to, to be valueless to the wife as a safeguard against the coercion of her husband, and imposition from others, the provision is not simply harmless, but has been the occasion of frequent fraud and wrong; for it has often happened that when a wife has joined her husband in a conveyance, under laws requiring her to do so, and her acknowledgment has been made to the officer separate and apart, so fully and completely in all respects, as required by law, and the officer, purposely or ignorantly, has failed to write the certificate of acknowledgment in the exact form required, the wife, being controlled by the husband, has refused to aid in the correction of the error, and the purchaser is left without a remedy.

It is very safe to say that greater frauds and more injustice has resulted from the requirement of this form of acknowledgment, on the part of the wife, than would be likely to obtain where the wife's acknowledgment may be taken as in other cases. Again, the provision, if valueless to the wife, is not harmless. It treats the wife as an inferior person, especially liable to coercion and imposition, and as being incable of caring for and guarding her own interests, as other sane persons are capable of doing.

If our statutes of 1864 and 1865, which counsel for respondent insists are still in force, are so, and are not repealed by the Act of 1871, the woman who married yesterday, and was possessed of a fortune acquired by her own learning, labor or skill, cannot to-day make a valid sale of a dilapidated sewing machine, without putting the contract in writing, and going before a Justice of the Supreme Court, or other officer, and acknowledging upon an examination, separate and apart from her husband, upon being made acquainted with the contents of the instrument, (which she may have written herself,) that she executed the same freely and voluntarily, &c.

We will now examine the several Acts of our Legislature, bearing upon the question under consideration, and in the light of these enactments review the decision in the case of Miller vs. Fisher; for if that decision was erroneous, if it clearly appear that the law was not what it was declared to be in that case, the construction we then gave to the statute must be overruled, however beneficial that construction may appear to be, to those whose rights and interests are involved in the question. Section 1, chapter 32, "of the rights of married women," Howell Code, reads as follows: "The real and personal estate of every female, acquired before marriage, and all property, real and personal, to which she may afterwards become entitled by gift, grant, inheritance, devise, or in any other manner, shall be and remain the estate and property of such female, and shall not be liable for the debts, obligations or engagements of her husband, and may be contracted, sold, transferred, mortgaged, conveyed, devised or bequeathed by her, in the same manner and with like effect, as if she were unmarried." Section 2, of chapter 42, "of conveyances," Howell Code, reads as follows: "Husband and wife may, by their joint deed, convey the real estate of the wife in like manner as she might do by her separate deed if she were unmarried." Section 19, same chapter, reads as follows: "A married woman may convey any of her real estate, by any conveyance thereof, executed and acknowledged by herself and her husband, and certified in the manner hereinafter provided by the proper officer taking the acknowledgment." Section 21, same chapter, reads as follows: "Any officer authorized by this chapter to take the proof or acknowledgment of any conveyance, whereby any real estate is conveyed, or may be affected, may take and certify the acknowledgment of a married woman to any such conveyance of real estate." Section 22, same chapter, reads as follows: "No such acknowledgment shall be taken, unless such married woman shall be personally known to the officer taking the same, to be the person whose name is subscribed to such conveyance, as a party thereto, or shall be proved to be such by a creditable witness; nor unless such married woman shall be made acquainted with the contents of such conveyance, and shall acknowledge on an examination apart from and without the hearing of her husband, that she executed the same, freely and voluntarily, without fear or compulsion or undue influence of her husband, and that she does not wish to retract the execution of the same." The next section prescribes merely the form of the certificate of the acknowledgment, and need not be quoted. The same chapter designates the officers who may take acknowledgments of deeds in the Territory, among whom are notaries public, and justices of the peace, of the proper county.

In the case of Miller vs Fisher the court overlooked the provisions in the statute on conveyances, contained in the Howell Code, and quoted above, and regarding the first section of the Act, "of the rights of married women," Howell Code, as controlling upon the questions as to what the law was upon the subject in 1864, held that it was the intention of the Legislature, by the Act of 1871, to reinstate married women of the age of 21 years and upwards, as to their rights to their separate property, to the same status in which they stood, as was supposed by the court, under the provisions of the section referred to in the Act of 1864, "of the rights of married women."

An attempt was made by the counsel for the respondent, to reconcile this section with the several sections of the chapter on conveyances, above quoted, but to us the provisions of these two chapters seem irreconcilable. The first section quoted, authorizes the wife "to contract, sell, transfer, mortgage, convey, devise or bequeath her separate property, in the same manner, with the like effect, as if she were unmarried." Her conveyance as soon as made would become effectual. The delivering of the deed by her would divest her of all interest in the property, without any acknowledgment whatever. Whereas, under the section referred to in the chapter on conveyances, of the year 1864, the wife's deed of her separate property would be a nullity, until acknowledged, as in that statute provided. Standing alone and uncontrolled by other provisions, there can be no doubt that under the first section of the Act of 1864, a married woman, without being joined by her husband, could convey her separate property, in the same manner and without other observances as to forms or acknowledgment, than would be required if she were unmarried. And it was so considered by the court in deciding the case of Miller vs. Fisher, for, as has been already stated, in passing upon that case, the court only looked to this section as controlling the law upon this subject, under the original Howell Code, overlooking the provisions touching the matter in the chapter on conveyances, but giving effect to the provisions in the last named chapter. The husband must join in the conveyance, and the manner and form of the conveyance are clogged by the condition of the wife's acknowledgment, separate and apart, &c., before the deed can become effectual for any purpose whatever.

The Howell Code was prepared in great haste, immediately after the organization of the Territory, and acted upon at the first session of our Legislature, and there was little time for careful consideration of the provisions of the statutes of other States, which were incorporated into the Code. And it is not derogating from the just praise to which its author and the Legislature are fairly entitled, to say there was much that was incongruous and unsystematized in its provisions.

We have quoted the statutes, bearing upon the subject of the wife's acknowledgment, as they stood at the adjournment of the session of the Legislature of 1864. In 1865 an Act was passed, the first section of which reads as follows: "All property, both real and personal, of the wife, owned by her before marriage, and that acquired afterwards by gift, bequest, devise, or descent, shall be her separate property, and all property, both real and personal, owned by the husband before marriage, and that acquired by him afterwards by gift, bequest, devise or descent, shall be his separate property." The second section of the same Act provides: "That all property acquired after marriage, by either husband or wife, except such as may be acquired by gift, bequest, devise or descent, shall be common property." The 3d, 4th, and 5th sections of this same Act provide for inventory and registration of the separate property of the wife, and the 6th section,—from the operation of which in Miller vs. Fisher, we held married women of the age of 21 years and upwards, exempt as to this acknowledgment, by force of this Act of 1871,—reads as follows: "The husband shall have the management and control of the separate property of the wife during the continuance of the marriage, but no sale or alienation of any part of such property can be made, nor any lien or incumbrance created thereon, unless by an instrument in writing signed by the husband and wife, and acknowledged by her upon examination separate and apart from her husband before a Justice of the Supreme Court, Probate Judge or Notary Public, or if executed out of the Territory, then acknowledged before some Judge of a court of record, or before a commissioner, appointed under the authority of this Territory, to take acknowledgment of deeds." It will be observed that this section does not provide that the wife shall be "made acquainted with the contents of the instrument" she is executing, nor that she shall "acknowledge upon an examination, separate and apart, that she executed the same freely and voluntarily, without fear or compulsion or undue influence of her husband, and that she does not wish to retract the execution of the same," as provided in the Act of 1864, on conveyances. But the observance of these requirements of the last mentioned Act, was probably contemplated by section 6, of the Act of 1865, now under consideration.

We have set out the several enactments bearing upon the question we are considering, up to the time of the passage of the Act of 1871. That Act is in these words: Section 1: "Married women of the age of 21 years and upwards, shall have the sole and exclusive control of their separate property, and may convey and transfer lands or any estate or interest therein, vested in or held by them in their own right, and without being joined by the husband in such conveyance, as fully and perfectly as they might do if unmarried." Section 2: "All Acts and parts of Acts, so far as they conflict with the provisions of this Act; are hereby repealed." It was under this Act, with its repealing clause, that this court held, in the case of Miller vs Fisher, the provisions of the 6th section of the Act of 1865 and all former provisions upon the subject under consideration, inoperative as to married women of the age of 21 years and upwards. It is true that in that case the question before the court was, as to the right of a married woman to make a conveyance of her separate personal property, without a writing so acknowledged, &c., but the section referred to in the Act of 1865 includes "all the separate property of the wife," and provides that "no sale or other alienation of any part of such property shall be made," except by such writing, so acknowledged, &c. Upon the argument in that case, and we think in the brief of the counsel of the respondent therein, the attention of the court was called to some of the leading authorities cited by the counsel for the respondent in this, and the same position insisted upon which is now urged, that the Act of 1871 only operated to repeal the provision of section 6, of the Act of 1865, so far as it required that the wife shall be joined by her husband in the conveyance, &c. And yet the court were unanimously of the opinion that the provisions in that section, touching the acknowledgments of married women of the age of 21 years and upwards, were swept away by the Act of 1871.

And as the court then held, the majority of the court now holds that by the Act of 1871, the Legislature in providing that a married woman's separate property should no longer be left to the management of her husband, but should be under her own sole and exclusive control, and that she might convey and transfer the same as fully and perfectly as if unmarried, intended in all respects to place the wife of the age of 21 years in precisely the same attitude, as to the conveyance of her property, as if she were a feume sole, that she should no longer be hampered with conditions and provisions, in the transfer and conveyance of her separate property, which are not imposed upon unmarried women.

Among all the rules for the construction of statutes, so liberally quoted by the respondent's counsel, no one is more likely to lead to a truer interpretation of the intention of the Legislature, in an enactment, than that of giving to its language and scope the meaning it would convey to the common mind. It was upon such a reading of this Act of 1871 that this court held that the acknowledgment, separate and apart, &c., by the wife, as to her separate property, was no longer necessary to her conveyance thereof. The Act was certainly calculated to mislead those acting under it, if it is to be construed as requiring any other act or the observance of any other formula, on the part of a married woman, than is required of an unmarried one. We think it is clear that the Legislature intended by the Act just what any person of ordinary intelligence would understand by it, and would receive and adopt as its obvious meaning. And we have no doubt that the common understanding of intelligent persons, as to the meaning of the Act, would be in precise accordance with the construction we gave to it, in Miller vs Fisher.

Again, had the Act been intended in this regard only to relieve married women from being joined in a conveyance of their separate property by their husbands, and not to extend farther, it seems to us the Legislature would have used other terms than those with which the section concludes, and would have said, "as fully and perfectly as if so joined," rather than the terms, "as fully and perfectly as they might do if unmarried." Certainly such a wording of the statute would make the construction given to it by the counsel of the respondent, much more plausible than the terms therein used. But the counsel for the respondent insists that the requirement as to the acknowledgment, contained in section 6, of the Act of 1865, does not operate as a hindrance or obstruction to the perfect freedom of the wife in conveying her property; that the requirement has to do with the mode only, and that not in such a way as to prevent her from conveying as fully and perfectly as if unmarried. Is this so? Un-

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